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Preparatory Commission for the International Criminal Court

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Proceedings of the Preparatory Commission at its first session (16–26 February 1999)

Summary*

Rapporteur: Mr. Salah **Suheimat** (Jordan)

1. The Preparatory Commission for the International Criminal Court, established in accordance with resolution F adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, met at United Nations Headquarters from 16 to 26 February 1999, in accordance with General Assembly resolution 53/105 of 8 December 1998.

2. Under paragraph 2 of resolution F of the Conference, the Preparatory Commission shall consist of representatives of States which have signed the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court and other States which have been invited to participate in the Conference.

3. Under paragraph 4 of General Assembly resolution 53/105, the Secretary-General was requested to convene the Preparatory Commission, in accordance with resolution F of the Conference, from 16 to 26 February, 26 July to 13 August and 29 November to 17 December 1999, to carry out the mandate of that resolution and, in that connection, to discuss ways to enhance the effectiveness and acceptance of the Court.

4. In accordance with paragraph 6 of the same resolution, the Secretary-General invited, as observers to the Preparatory Commission, representatives of organizations and other entities that have received a standing invitation from the General Assembly, pursuant to its relevant resolutions, to participate in the capacity of observers in its sessions and work,

* Incorporating documents PCNICC/1999/L.3, as orally amended at the 3rd plenary meeting, on 26 February 1999, and annexes I (list of documents issued at the first session of the Preparatory Commission) and II and III (documents prepared by the Secretariat on the basis of the oral reports of the Coordinators for the Rules of Procedure and Evidence and for the Elements of Crimes).

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and also invited as observers to the Preparatory Commission representatives of interested regional intergovernmental organizations and other interested international bodies, including the international tribunals for the former Yugoslavia and Rwanda.

5. Under paragraph 7 of resolution 53/105, non-governmental organizations may participate in the work of the Preparatory Commission by attending its plenary and its other open meetings, in accordance with the rules of procedure to be adopted by the Commission, receiving copies of the official documents and making available their materials to delegates.

6. The session was opened by the Secretary-General of the United Nations, Mr. Kofi Annan, and by the Under-Secretary-General, the Legal Counsel, Mr. Hans Corell, both of whom made statements.

7. The Director of the Codification Division of the Office of Legal Affairs, Mr. Václav Mikulka, acted as Secretary of the Preparatory Commission. The Codification Division provided the substantive servicing for the Commission.

8. At its 1st and 2nd meetings, on 16 and 22 February 1999, the Preparatory Commission elected its Bureau, as follows:

Chairperson: Mr. Philippe Kirsch (Canada)

Vice-Chairpersons: Mr. George Winston McKenzie (Trinidad and Tobago)
Mr. Medard R. Rwelamira (South Africa)
Mr. Muhamed Sacirbey (Bosnia and Herzegovina)

Rapporteur: Mr. Salah Suheimat (Jordan)

9. At its 1st meeting, on 16 February 1999, the Preparatory Commission adopted the following agenda (PCNICC/1999/L.1):

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Organization of work.
5. Implementation of resolution F of the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, adopted on 17 July 1998, and paragraph 4 of General Assembly resolution 53/105 of 8 December 1998.
6. Adoption of the report.

10. Also at its first session, the Preparatory Commission agreed that its rules of procedure are the rules of procedure of the General Assembly as applied to the Main Committees together with paragraphs 6 and 7 of General Assembly resolution 53/105.

11. Taking account of the priorities set forth by resolution F of the Conference, the Preparatory Commission agreed on a work plan for the February session focusing on two essential instruments necessary for the functioning of the Court: the Rules of Procedure and Evidence, and the Elements of Crimes. With respect to the Rules of Procedure and Evidence, the Preparatory Commission concentrated on such rules pertaining to the following parts of the Rome Statute of the International Criminal Court: Part 5 (Investigation and Prosecution); Part 6 (The Trial); and Part 8 (Appeal and Revision). The Preparatory Commission also undertook a preliminary consideration of the modalities of discussion for a definition of the crime of aggression listed in article 5, paragraph 2, of the Rome Statute.

12. In order to facilitate the tasks of the Preparatory Commission, the Chairperson, in consultation with the Bureau, designated Ms. Silvia Fernandez de Gurmendi (Argentina) to serve as Coordinator for the Rules of Procedure and Evidence and Mr. Herman van Hebel (Netherlands) to serve as Coordinator for the Elements of Crimes.

13. Also in order to facilitate the work of the Preparatory Commission at future sessions, the Chairperson, in consultation with the Bureau, designated the following Coordinators:

- Mr. Rolf Fife (Norway) for the Rules of Procedure and Evidence relating to Part 7 (Penalties) of the Statute;
- Mr. Phakiso Mochochoko (Lesotho) for the Rules of Procedure and Evidence relating to Part 9 (International Cooperation and Judicial Assistance) of the Statute;
- Mr. Medard R. Rwelamira (South Africa) for the Rules of Procedure and Evidence relating to Part 4 (Composition and Administration of the Court) of the Statute.

14. Taking account of the remaining tasks of the Preparatory Commission listed in resolution F of the Conference, the Chairperson, in consultation with the Bureau, asked Mr. Tuvaku Manongi (United Republic of Tanzania) to serve as Coordinator for the definition of the crime of aggression. In addition, the Chairperson designated Mr. Hiroshi Kawamura (Japan) as the contact point in respect of the draft texts of financial regulations and rules, a budget for the first financial year and the rules of procedure of the Assembly of States Parties; and Mr. Cristian Maquiera (Chile) as the contact point for the draft texts of a relationship agreement between the Court and the United Nations, basic principles governing a headquarters agreement to be negotiated between the Court and the host country, a draft agreement on the privileges and immunities of the Court, and the request contained in paragraph 4 of General Assembly resolution 53/105.

15. At its third meeting on 26 February 1999, the Preparatory Commission took note of the oral reports of the Coordinators for the Rules of Procedure and Evidence and for the Elements of Crimes.

16. At the same meeting, for ease of reference of delegations, the Preparatory Commission requested the Secretariat to prepare a document on the basis of the oral reports of the Coordinators and to annex it to the present report.

Annex I

List of documents issued at the first session of the Preparatory Commission (16–26 February 1999)

General documents

Symbol	*Description*
PCNICC/1999/L.1	Provisional agenda
PCNICC/1999/L.2	Note by the Secretariat
PCNICC/1999/L.3	Proceedings of the Preparatory Commission at its first session (Draft summary)
PCNICC/1999/L.3/Rev.1	Proceedings of the Preparatory Commission at its first session (Summary)
PCNICC/1999/INF.1	Provisional membership of the Preparatory Commission (First session)
PCNICC/1999/DP.1	Proposal submitted by Australia: Draft Rules of Procedure and Evidence of the International Criminal Court
PCNICC/1999/DP.2	Proposal by France: General outline of the Rules of Procedure and Evidence
PCNICC/1999/DP.3	Working paper submitted by France: Comments on the proposal by Australia contained in document PCNICC/1999/DP.1 (Part 2)
PCNICC/1999/DP.4	Proposal submitted by the United States of America: Draft elements of crimes (I. General comments; II. Terminology; III. Article 6: Crimes of genocide)
PCNICC/1999/DP.4/Add.1	Addendum: IV. Article 7: Crimes against humanity
PCNICC/1999/DP.4/Add.2	Addendum: V. Article 8: War crimes
PCNICC/1999/DP.4/Add.3	Addendum: VI. Inchoate offences
PCNICC/1999/DP.5	Proposal submitted by Hungary and Switzerland: Elements of Crimes: Article 8 (2) (a) of the Rome Statute of the International Criminal Court
PCNICC/1999/DP.5/Corr.1	Corrigendum (French and Russian only)
PCNICC/1999/DP.5/Corr.2	Corrigendum (English only)
PCNICC/1999/DP.6	Proposal by France on Rules of Procedure and Evidence: Part 3 (Trial proceedings), section 3 (Pre-trial phase), Subsection 1 (Commencement of investigation and proceedings)
PCNICC/1999/DP.7	Proposal by France on Rules of Procedure and Evidence: Part 3, section 3, subsection 2 (Conduct of investigation and proceedings)
PCNICC/1999/DP.7/Add.1	Addendum (continued)
PCNICC/1999/DP.7/Add.2	Addendum (continued)
PCNICC/1999/DP.8	Proposal by France on Rules of Procedure and Evidence: Part 3, section 3, subsection 3
PCNICC/1999/DP.8/Add.1	Addendum (continued)

Symbol	*Description*
PCNICC/1999/DP.8/Add.2	Addendum (continued)
PCNICC/1999/DP.9	Proposal submitted by Spain: Working paper on Elements of Crimes: Introduction; preliminary observations; ıements of the crime of genocide (article 6 of the Statute)
PCNICC/1999/DP.9/Add.1	Addendum: Article 7 of the Statute
PCNICC/1999/DP.9/Add.2	Addendum: Article 8 of the Statute
PCNICC/1999/DP.10	Proposal submitted by France concerning the Rules of Procedure and Evidence: Part 3, section 1, subsection 2
PCNICC/1999/DP.10/Add.1	Addendum: Part 3, section 1, subsection 1 (Seat of the court)
PCNICC/1999/DP.11	Proposal submitted by Bahrain, Iraq, Lebanon, the Libyan Arab Jamahiriya, Oman, the Sudan, the Syrian Arab Republic and Yemen on the crime of aggression

Working Group on Rules of Procedure and Evidence

Symbol	*Description*
PCNICC/1999/WGRPE/DP.1	Proposed amendments to documents PCNICC/1999/DP.6 and DP.8 submitted by Italy
PCNICC/1999/WGRPE/DP.2	Proposal submitted by Colombia: Comments on the proposals submitted by France (PCNICC/1999/DP.6) and Australia (PCNICC/1999/DP.1) on the Rules of Procedure and Evidence
PCNICC/1999/WGRPE/DP.3	Proposal by Costa Rica concerning the Rules of Procedure and Evidence
PCNICC/1999/WGRPE/DP.4	Proposal submitted by Colombia concerning comments proposed by the Coordinator (documents WGRPE/RT.1 and RT.2)
PCNICC/1999/WGRPE/INF.1	Information note from France for delegations and intergovernmental and non-governmental organizations
PCNICC/1999/WGRPE/RT.1	Discussion paper proposed by the coordinator: Part 5 of the Rome Statute: Investigation and Prosecution (rule 5.1–5.4)
PCNICC/1999/WGRPE/RT.2	Discussion paper proposed by the Coordinator: Part 5 of the Rome Statute: Investigation and Prosecution (rule 5.5–5.8)
PCNICC/1999/WGRPE/RT.3	Discussion paper proposed by the Coordinator: Part 5 of the Rome Statute: Investigation and Prosecution (rule 5.9–5.10)
PCNICC/1999/WGRPE/RT.3/Corr.1	Discussion paper proposed by the Coordinator: Part 5 of the Rome Statute: Investigation and Prosecution (rule 5.9)

Symbol	*Description*
PCNICC/1999/WGRPE/RT.4	Discussion paper proposed by the Coordinator: Part 5 of the Rome Statute: Investigation and Prosecution (rule 5.11–5.21)

Working Group on Elements of Crimes

Symbol	*Description*
PCNICC/1999/WGEC/DP.1	Proposal submitted by France: Comments on the proposal submitted by the United States of America concerning article 6, Crime of genocide (PCNICC/1999/DP.4)
PCNICC/1999/WGEC/DP.2	Proposal submitted by Colombia: Comments on the proposal submitted by the United States of America concerning article 6, Crime of genocide (PCNICC/1999/DP.4)
PCNICC/1999/WGEC/DP.3	Proposal submitted by Colombia: Comments on the proposals by the United States of America (PCNICC/1999/DP.4/Add.2) and Hungary and Switzerland (PCNICC/1999/DP.5 and Corr.2) concerning war crimes
PCNICC/1999/WGEC/DP.4	Proposal submitted by Algeria, Bahrain, Comoros, Djibouti, Egypt, Jordan, Iraq, Kuwait, Lebanon, Libyan Arab Jamahiriya, Mauritania, Morocco, Oman, Qatar, Saudi Arabia, Sudan, Syrian Arab Republic, Tunisia, United Arab Emirates and Yemen: Comments on the proposal submitted by the United States concerning terminology and the crime of genocide (PCNICC/1999/DP.4)
PCNICC/1999/WGEC/DP.4/Add.1	Addendum
PCNICC/1999/WGEC/DP.5	Proposal submitted by Japan: Elements of Crimes: Article 8.2 (a) of the Rome Statute of the International Criminal Court
PCNICC/1999/WGEC/DP.6	Proposal submitted by Costa Rica on Elements of Crimes
PCNICC/1999/WGEC/INF.1	Request from the Governments of Belgium, Costa Rica, Finland, Hungary, South Africa and Switzerland regarding the text prepared by the International Committee of the Red Cross on article 8, para. 2 (a), of the Rome Statute of the International Criminal Court
PCNICC/1999/WGEC/RT.1	Discussion paper proposed by the Coordinator: Article 6: The crime of genocide
PCNICC/1999/WGEC/RT.2	Discussion paper proposed by the Coordinator: Article 8: War crimes
PCNICC/1999/WGEC/RT.3	Discussion paper proposed by the Coordinator: Suggested comments relating to the crime of genocide

Annex II

Annex II was prepared by the Secretariat on the basis of the oral report of the Coordinator for the Working Group on Rules of Procedure and Evidence presented to the Preparatory Commission at its 3rd meeting, on 26 February 1999.

1. The Working Group on Rules of Procedure and Evidence held nine meetings, from 16 to 26 February 1999. It had before it proposals contained in documents PCNICC/1999/DP.1; PCNICC/1999/DP.2; PCNICC/1999/DP.3; PCNICC/1999/DP.6; PCNICC/1999/DP.7 and Add.1 and 2; PCNICC/1999/DP.8 and Add.1 and 2; PCNICC/1999/DP.10 and Add.1, PCNICC/1999/WGRPE/DP.1; PCNICC/1999/WGRPE/DP.2; PCNICC/1999/WGRPE/DP.3; PCNICC/1999/WGRPE/DP.4; and PCNICC/1999/WGRPE/INF.1.

2. The Working Group considered various proposals submitted in connection with Part 5 of the Statute, dealing with the following subject matters: commencement of investigation and proceedings, including notification of the decisions of the Prosecutor, procedure to be followed in the event of an application for review of a decision not to proceed with an investigation or not to prosecute and supervision by the Pre-Trial Chamber of decisions of the Prosecutor taken in the interests of justice; conduct of investigation and proceedings, including measures to restrict or deprive a person of liberty; disclosure; and closure of the pre-trial phase, including proceedings on confirmation of charges in the presence of the person; consequences of the decisions taken by the Pre-Trial Chamber, final decisions on confirmation, amendment of the charges, transition from the pre-trial phase to the trial and confirmation proceedings in the absence of the person charged.

3. Taking into account the written proposals and the views expressed in the Working Group and in informal consultations, the Coordinator proposed the following discussion papers for consideration at the next session of the Preparatory Commission (see appendix): PCNICC/1999/WGRPE/RT.1 on commencement of investigations and proceedings; PCNICC/1999/WGRPE/RT.2 on the procedure to be followed in the event of an application for review of a decision by the Prosecutor not to proceed with an investigation or not to prosecute, as well as the review by the Pre-Trial Chamber of decisions of the Prosecutor under article 53 (1) (c) or 2 (c); PCNICC/1999/WGRPE/RT.3 on proceedings with regard to the confirmation of the charges; and PCNICC/1999/WGRPE/RT.4 on disclosure. The numbering of the rules in these discussion papers is of a provisional nature, pending a decision regarding the structure of the Rules of Procedure and Evidence.

Appendix

Discussion papers proposed by the Coordinator

Part 5 of the Rome Statute

Investigation and Prosecution

Rules 5.1 to 5.4[a]

Rule 5.1. Determination of reasonable basis to proceed with an investigation under article 15

In determining whether there is a reasonable basis to proceed with an investigation under article 15, paragraph 3, the Prosecutor shall consider the factors set out in article 53, paragraph 1 (a)–(c).

Rule 5.2. Evaluation by the Prosecutor of information provided to him or her

In acting pursuant to article 53, paragraph 1, the Prosecutor shall, in evaluating the information made available to him or her, analyse the seriousness of the information received.

For this purpose the Prosecutor may seek additional information from States, organs of the United Nations, intergovernmental and non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

[N.B. These two rules replace rule 54.1 in document PCNICC/1999/DP.6.]

Rule 5.3. Notification of a decision not to initiate an investigation

(a) When the Prosecutor decides not to initiate an investigation under article 53, paragraph 1, he or she shall, as soon as possible, inform in writing the State or States that referred a situation to him or her under article 14, or the Security Council in respect of a situation covered by article 13, paragraph (b).

When the Prosecutor decides not to submit to the Pre-Trial Chamber a request for authorization of an investigation under article 15, he or she shall, as soon as possible, inform in writing those who provided him or her with information in accordance with that article.

(b) The notifications referred to in paragraph (a) shall contain the Prosecutor's conclusion, the reasons for the conclusion, as well as a full explanation of those reasons.

[a] Rules 5.1 to 5.4 are reproduced from discussion paper PCNICC/1999/WGRPE/RT.1.

(c) In any case when the Prosecutor decides not to proceed with an investigation solely on the basis of article 53, paragraph 1 (c), he or she shall inform the Pre-Trial Chamber in writing as soon as possible after making that decision.

The notification shall contain the Prosecutor's conclusion, the reasons for the conclusion, as well as a full explanation of those reasons.

(d) The victims or their legal representatives shall be informed under the terms set forth in rules X to XX.

Footnote to (d):

This provision will be considered at the July/August session of the Preparatory Commission as part of a comprehensive discussion of the participation by victims in proceedings before the Court.

[N.B. This rule replaces rule 54.2 in document PCNICC/1999/DP.6 and rule 56 in document PCNICC/1999/DP.1.]

Rule 5.4. Notification of a decision by the Prosecutor not to prosecute

(a) When the Prosecutor decides that there is not a sufficient basis for a prosecution under article 53, paragraph 2, he or she shall, as soon as possible, inform in writing the Pre-Trial Chamber, together with the State or States that referred a situation to him or her under article 14, or the Security Council in respect of a situation covered by article 13, paragraph (b).

(b) The notifications referred to in paragraph (a) shall contain the Prosecutor's conclusion, the reasons for the conclusion, as well as a full explanation of those reasons.

(c) The victims or their legal representatives shall be informed under the terms set forth in rules X to XX.

Footnote to (c):

This provision will be considered at the July/August session of the Preparatory Commission as part of a comprehensive discussion of the participation by victims in proceedings before the Court.

[N.B. This rule replaces rule 54.3 in document PCNICC/1999/DP.6 and rule 60 in document PCNICC/1999/DP.1.]

Rules 5.5 to 5.8[b]

Procedure to be followed in the event of an application for review of a decision by the Prosecutor not to proceed with an investigation or not to prosecute

[N.B. The following two rules replace rules 55.1 and 55.2 in document PCNICC/1999/DP.6 and rules 57 and 61 in document PCNICC/1999/DP.1.]

[b] Rules 5.5 to 5.8 are reproduced from discussion paper PCNICC/1999/WGRPE/RT.2.

Rule 5.5

(a) A request under article 53, paragraph 3, for a review of a decision by the Prosecutor not to initiate an investigation or not to prosecute shall be made in writing within 90 days following the notification given under rule X or XX.

The request shall be supported with reasons.

(b) The Pre-Trial Chamber may request the Prosecutor to transmit the information or documents in his or her possession, or summaries thereof, that the Chamber considers necessary for the conduct of the review.

The Pre-Trial Chamber shall take such measures as are necessary to protect this information under articles 54, 72 and 93 and to protect the safety of witnesses and victims and members of their families under article 68, paragraph 5.

(c) When a State or the Security Council makes a request referred to in paragraph (a) above, the Pre-Trial Chamber may seek further observations from them.

(d) The victims or their legal representatives shall also be informed of this review and may take part in it subject to the conditions laid down in rules X to XX.*

They may, in accordance with article 19, paragraph 3, submit any observations on the jurisdiction of the Court or the admissibility of the case, if the request to the Pre-Trial Chamber concerns these issues.**

Footnote*

This provision will be considered at the July/August session of the Preparatory Commission as part of the comprehensive discussion of the participation by victims in proceedings before the Court.

Footnote**

This rule will need to be considered as part of a general discussion of the rules which may be required to underpin article 19.

Rule 5.6*

(a) A decision of the Pre-Trial Chamber, concurred in by a majority of the judges comprising the Chamber, shall contain reasons, as well as a full explanation of those reasons. It shall be communicated to all those who were involved in the review.

Where the Pre-Trial Chamber requests the Prosecutor to review, in whole or in part, his or her decision not to initiate an investigation or not to prosecute, the Prosecutor shall reconsider that decision as soon as possible.

(b) Once the Prosecutor has taken a final decision, he or she shall notify the Pre-Trial Chamber in writing. This notification shall contain the Prosecutor's conclusion, the reasons for the conclusion as well as a full explanation of those reasons. It shall be communicated to all those who were involved in the review.

Footnote*

While undertaking a review under article 53, the Pre-Trial Chamber may have to address issues relating to article 19. In turn, this may raise issues about the right to appeal a decision under article 19.

Review by the Pre-Trial Chamber of decisions of the Prosecutor under article 53 (1) (c) or (2) (c)

[N.B. The following two rules replace rules 56.1 and 56.2 in document PCNICC/1999/DP.6 and rules 58 and 62 in document PCNICC/1999/DP.1.]

Rule 5.7

(a) The Pre-Trial Chamber may on its own initiative review a decision of the Prosecutor taken solely under article 53, paragraph 1 (c) or 2 (c), following the notification given under rule X or XX.

The Pre-Trial Chamber shall inform the Prosecutor of its intention to review his or her decision and shall establish a time-frame during which he or she may submit observations.

In cases in which a request has been submitted to the Pre-Trial Chamber by a State or by the Security Council, the latter shall also be informed and may submit observations in accordance with rule X.

(b) The victims or their legal representatives shall also be informed of this review and may take part in it subject to the conditions laid down in rules X to XX.

Footnote to (b):

This provision will be considered at the July/August session of the Preparatory Commission as part of a comprehensive discussion of the participation by victims in proceedings before the Court.

Rule 5.8

(a) A decision of the Pre-Trial Chamber, concurred in by a majority of the judges comprising the Chamber, shall contain reasons, as well as a full explanation of those reasons. It shall be communicated to all those who were involved in the review.

When the Pre-Trial Chamber does not confirm the decision of the Prosecutor, he or she shall proceed with the investigation or prosecution.

Rules 5.9 and 5.10[c]

Proceedings with regard to the confirmation of the charges

[N.B.: The following rules replace rules 61.1 and 61.2 in document PCNICC/1999/DP.8 and rules 63 and 64 in document PCNICC/1999/DP.1.]

[c] Rules 5.9 and 5.10 are reproduced from discussion paper PCNICC/1999/WGRPE/RT.3.

Rule 5.9

(a) A person subject to a warrant of arrest or a summons to appear under article 58 shall appear before the Pre-Trial Chamber, in the presence of the Prosecutor, promptly upon arriving at the Court. Subject to the provisions of Article 60 and 61, the person shall enjoy the rights set forth in article 67.

At this first appearance, the Pre-Trial Chamber shall set the date on which it intends to hold a hearing to confirm the charges. It shall ensure that this date, and any postponements under paragraph (d) of this rule, are made public.

Between this first appearance and the confirmation hearing, evidence shall be disclosed in accordance with rules x to xx.

(b) The Prosecutor shall provide to the Pre-Trial Chamber and to the person no later than 30 days before the date of the confirmation hearing a detailed description of the charges together with a list of the evidence which he or she intends to present at that hearing.

Where the Prosecutor intends to amend the charges pursuant to article 61, paragraph 4, he or she shall notify the Pre-Trial Chamber and the person no later than 15 days before the date of the hearing.

Where the Prosecutor intends to present new evidence at the hearing he or she shall provide the Pre-Trial chamber and the person with a list of that evidence.[d]

(c) If the person intends to present evidence under article 61, paragraph 6, the person shall provide a list of that evidence to the Pre-Trial Chamber no later than 15 days before the date of the hearing. The Pre-Trial Chamber shall transmit the list to the Prosecutor without delay. The person shall provide a list of evidence that he or she intends to present in response to any amended charges or a new list of evidence provided by the Prosecutor.

(d) The Prosecutor and the person may ask the Pre-Trial Chamber to postpone the date of the confirmation hearing. The Pre-Trial Chamber may also, of its own motion, decide to postpone the hearing.[e]

The Pre-Trial Chamber shall not take into consideration charges and evidence presented after the time-limit, or any extension thereof, has expired.

(e) The Prosecutor or the person may lodge written submissions with the Pre-Trial Chamber, on points of fact and of law, including grounds for excluding criminal responsibility set forth in article 31, paragraph 1, no later than three days before the date of the hearing. A copy of these submissions shall be transmitted immediately to the Prosecutor or the person, as the case may be.

(f) The Registry shall create and maintain a record of the proceedings before the Pre-Trial Chamber, including all documents transmitted to the Pre-Trial Chamber pursuant to this Rule. The record may be consulted by the Prosecutor and by the person.

(g) Victims and their legal representatives, who shall have access to the proceedings by virtue of article 68 of the Statute and in accordance with the conditions laid down in rules (x) to (xx), shall be notified of the date of the confirmation hearing and any postponements thereof.

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[d] Access to the evidence referred to in the lists shall be governed by the Rules concerning disclosure, in particular those rules relating to the preparation of the confirmation hearing.

[e] The question of whether and which time-limits can be enlarged or reduced by the Court will also be addressed in the context of proposals on a general provision about time-limits.

They may consult the record of the proceedings put together in accordance with paragraph (f) of this Rule. They may lodge written submissions with the Pre-Trial Chamber no later than 15 days before the date of the hearing.

They may also ask to intervene during the hearing, by addressing a written request to that effect to the Pre-Trial Chamber no later than 15 days before the date of the hearing. The Pre-Trial Chamber shall rule on the request after receiving the observations of the Prosecutor and the person.[f]

(h) States wishing to challenge the jurisdiction of the Court or the admissibility of the case before the Pre-Trial Chamber at the time of the confirmation hearing shall make a written request to that effect no later than 30 days before the date of the hearing.

States may request the Pre-Trial Chamber to postpone the date of the hearing, in accordance with the conditions laid down in paragraph (d) of this rule.

They shall lodge their written submissions with the Registry no later than 15 days before the hearing. Such submissions shall be joined to the record of the proceedings and transmitted to the Prosecutor, the person and the victims or their legal representatives, in accordance with the conditions laid down in rules (x) to (xx).[g]

Rule 5.10

(a) The President of the Pre-Trial Chamber shall ask the officer of the Registry assisting the court to read out the charges as presented by the Prosecutor. The President shall determine how the hearing is to be conducted and, in particular, may establish the order and the conditions in which he or she intends the parties to explain the documentary evidence contained in the record of the proceedings.

(b) Before hearing the matter on the merits, the President of the Pre-Trial Chamber shall ask

(i) the Prosecutor and the person, and any representatives of States present, whether they intend to raise objections or make observations concerning the jurisdiction of the Court or the admissibility of the case;

(ii) the Prosecutor and the person whether they intend to raise objections or make observations concerning an issue related to the proper conduct of the proceedings prior to the confirmation hearing;

(iii) the victims or their legal representatives whether they have any observations to make.[h]

At no subsequent point may the objections or observations made under (ii) above be raised or made again.

(c) If the objections or observations referred to in paragraph (b) of this rule are presented, the President of the Pre-Trial Chamber shall invite those referred to in paragraph

[f] Paragraph (g) will be considered at the July/August session of the Preparatory Commission as part of a comprehensive discussion of the participation by victims in proceedings before the Court.

[g] This provision will need to be considered as part of a general discussion of the Rules which may be required to underpin Article 19.

[h] This provision will be considered at the July/August session of the Preparatory Commission as part of a comprehensive discussion of the participation by victims in proceedings before the Court.

(b) of this rule to present their arguments, in the order in which he or she shall establish. The person shall have the right to reply.

If the objections raised or observations made are those referred to in paragraph (b) (i) above, the Pre-Trial Chamber shall separate these issues and adjourn the confirmation hearing. It shall render a decision, which may be appealed in accordance with the conditions laid down in article 82 and in rules (x) to (xx).

If the objections raised or observations made are those referred to in paragraph (b) (ii), the Pre-Trial Chamber shall decide whether to join the issues raised to the examination of the charges and the evidence, or to separate them, in which case it shall adjourn the confirmation hearing.

(d) During the hearing on the merits, the Prosecutor and the person shall present their arguments in accordance with paragraphs (5) and (6) of article 61.

The President of the Pre-Trial Chamber may also invite victims or their legal representatives to speak, if they have been allowed to participate in the hearing. In this case, the person and the Prosecutor shall always have the right to reply after the victims or their legal representative.[i]

Subject to the provisions of article 61, article 69 shall apply *mutatis mutandis* at the confirmation hearing. The Pre-Trial Chamber shall permit the victims participating in the hearing, the Prosecutor and the person, in that order, to make final observations. The President of the Pre-Trial Chamber may, in exceptional cases, authorize anyone participating in the proceedings to speak again, in which case the person shall have the right to reply.

Rules 5.11 to 5.21[j]

[N.B. The following rules replace rules 58.1, 58.2 and 58.3 in document PCNICC/1999/DP.7 and rules 65 to 73 in document PCNICC/1999/DP.1. The placement of rules 5.11 to 5.21 will be decided at a later stage.]

Rule 5.11. Disclosure for the purposes of the confirmation hearing

In accordance with article 61, paragraph 3, the Pre-Trial Chamber shall take the necessary decisions regarding disclosure between the Prosecutor and the person in respect of whom a warrant of arrest or a summons to appear has been issued. During disclosure the person concerned may be assisted or represented by the counsel of his or her choice or by counsel assigned to him or her.

For that purpose, the Pre-Trial Chamber shall hold status conferences to ensure that disclosure takes place under satisfactory conditions. For each case, a pre-trial judge shall be appointed to organize such status conferences, on his or her own motion, or at the request of the Prosecutor or the person concerned.

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[i] This provision will be considered at the July/August session of the Preparatory Commission as part of a comprehensive discussion of the participation by victims in proceedings before the Court.

[j] Rules 5.11 to 5.21 are reproduced from discussion paper PCNICC/1999/WGRPE/RT.4.

Rule 5.12. Communication of the disclosed evidence to the Pre-Trial Chamber

All evidence disclosed between the Prosecutor and the person concerned for the purposes of the confirmation hearing shall be communicated to the Pre-Trial Chamber.

Rule 5.13. Restrictions on disclosure

The Pre-Trial Chamber shall, on its own motion, or at the request of the Prosecutor, the person concerned or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, particularly by authorizing the non-disclosure of their identity.

Footnote

The question of the non-disclosure of the identity of witnesses needs further discussion.

Rule 5.14. Prior statements of a person subject to a hearing under article 61

The Prosecutor, where such material will not otherwise be provided in accordance with article 61, paragraph 3, shall provide the person before the Court with copies of all prior statements given by that person to the Prosecutor. This shall be done within a reasonable time before the hearing to confirm charges against the person. This requirement is without prejudice to the application of rule X.

Rule 5.15. Pre-trial disclosure relating to prosecution witnesses*

(a) The Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify at trial and copies of the statements made by those witnesses. This shall be done sufficiently in advance of the commencement of the trial to enable the adequate preparation of the defence.**

(b) The Prosecutor shall subsequently advise the defence of the names of any additional prosecution witnesses and provide copies of their statements when the decision is made to call those witnesses.

(c) The statements of prosecution witnesses shall be made available in a language which the accused fully understands and speaks.

(d) This rule is subject to the protection and privacy of victims and witnesses and the protection of confidential information as provided for in the Statute and rule 5.19.

Footnote*

This rule may be applicable, *mutatis mutandis*, before the Pre-Trial Chamber, for the purposes of the confirmation hearing. It needs further discussion.

Footnote**

The question of the non-disclosure of the identity of witnesses needs further discussion.

Rule 5.16. Inspection of material in possession or control of the Prosecutor

(a) The Prosecutor shall on request permit the defence to inspect any books, documents, photographs and tangible objects in his or her possession or control which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial or were obtained from or belonged to the person.

(b) This rule is subject to the protection and privacy of victims and witnesses and the protection of confidential information as provided for in the Statute and rule 5.19.

Footnote

This rule relates only to the inspection of material held by the Prosecutor. The issue of whether the Prosecutor should have access to material held by the defence also needs consideration.

Rule 5.17. Disclosure by the defence regarding the defence of alibi and certain grounds for excluding criminal responsibility recognized under article 31, paragraph 1

(a) The defence shall notify the Prosecutor of its intent to:

(i) Plead the existence of an alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names of witnesses and any other evidence upon which the accused intends to rely to establish the alibi; or

(ii) Raise a ground for excluding criminal responsibility provided for in article 31, paragraph 1 (a) or (b); in which case the notification shall specify the names of witnesses and any other evidence upon which the accused intends to rely to establish the ground.

This shall be done sufficiently in advance of the commencement of the trial to enable the Prosecutor to prepare adequately for trial.

(b) Failure of the defence to provide notice under this rule shall not limit the right of the accused to testify on the matters dealt with in paragraph (a).

Footnote

This rule only provides for limited disclosure by the defence. It raises the fundamental issue of the extent of the obligation of the defence to disclose matters to the Prosecutor. This rule also needs to be considered as part of the discussion on the Rules of Evidence.

This rule may be applicable, *mutatis mutandis*, before the Pre-Trial Chamber, for the purposes of the confirmation hearing. It needs further discussion.

Rule 5.18. Procedures for raising a ground for excluding criminal responsibility under article 31, paragraph 3

(a) The defence shall give notice to both the Trial Chamber and the Prosecutor if it intends to raise a ground for excluding criminal responsibility under article 31, paragraph 3. This shall be done sufficiently in advance of the commencement of the trial to enable the Prosecutor to prepare adequately for trial.

(b) Following notice given under sub-rule (a), the Trial Chamber shall hear both parties before deciding whether the defence can plead the ground for excluding criminal responsibility. The Trial Chamber may permit an appeal in accordance with article 82, paragraph 1 (d), from its decision on whether the ground can be pleaded.

(c) If the defence is permitted to plead the ground either by the Trial Chamber or, following an appeal under article 82, paragraph 1 (d), by the Appeals Chamber, the Trial Chamber may grant the Prosecutor an adjournment to prepare to address the ground raised by the defence.

(d) Where a ground for excluding criminal responsibility under article 31, paragraph 3, was not raised prior to the trial, the Trial Chamber may grant the Prosecutor an adjournment to prepare to address the ground raised by the defence.

Rule 5.19. Restrictions on disclosure

(a) Reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure.

(b) Where material or information is in the possession or control of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber dealing with the matter for a ruling on whether the material must be disclosed to the defence. The matter shall be heard on an *ex parte* basis by the Chamber. If the Chamber rules against disclosure, the Prosecutor may not subsequently introduce such material or information into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.

(c) Where material or information is in the possession or control of the Prosecutor which is withheld under article 68, paragraph 5, such material or information may not be subsequently introduced into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.

(d) Where material or information is in the possession or control of the defence which is subject to disclosure, it may be withheld in circumstances which would allow the Prosecutor to rely on article 68, paragraph 5, and a summary thereof submitted instead. Such material or information may not be subsequently introduced into evidence during the confirmation hearing or the trial without adequate prior disclosure to the Prosecutor.

(e) Where steps have been taken to ensure the confidentiality of information, in accordance with articles 54, 57, 64, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, such information shall not be disclosed, except in accordance with those articles.

(f) Where material or information is in the possession or control of the Prosecutor which is protected under article 54, paragraph 3 (e), the Prosecutor may not subsequently

introduce such material or information into evidence without adequate prior disclosure to the accused.

(g) If the Prosecutor introduces material or information protected under article 54, paragraph 3 (e), into evidence, the Chamber dealing with the matter may not order the production of additional evidence received from the provider of the initial material or information, nor may that Chamber for the purpose of obtaining such additional evidence itself summon the provider or a representative of the provider as a witness or order their attendance.

(h) If the Prosecutor calls a witness to introduce in evidence any material or information which has been protected under article 54, paragraph 3 (e), the Chamber dealing with the matter may not compel that witness to answer any question relating to the material or information or its origin, if the witness declines to answer on grounds of confidentiality.

(i) The right of the accused to challenge evidence which has been protected under article 54, paragraph 3 (e), shall remain unaffected subject only to the limitations contained in sub-rules (g) and (h).

(j) The Chamber dealing with the matter may order upon an application by the defence that, in the interests of justice, material or information in the possession of the accused, which has been provided to the accused under the same conditions as those set down in article 54, paragraph 3 (e), and is to be introduced into evidence, shall be subject *mutatis mutandis* to sub-rules (f), (g) and (h).

Rule 5.20. Ruling on exculpatory evidence

The Prosecutor may request as soon as practicable a hearing on an *ex parte* basis before the Chamber dealing with the matter for the purpose of obtaining a ruling under article 67, paragraph 2.

Footnote

This rule does not identify any consequences of the failure to disclose exculpatory evidence. Consideration needs to be given to this matter.

Rule 5.21. Continuing requirement to disclose

If either party intends to present additional evidence or material, whether previously or newly discovered, which should have been disclosed earlier pursuant to the Statute or the Rules, that party shall promptly notify the other party, and the Chamber dealing with the matter, of the existence of the additional evidence or material.

Annex III

Annex III was prepared by the Secretariat on the basis of the oral report of the Coordinator for the Working Group on the Elements of Crimes presented to the Preparatory Commission at its 3rd meeting, on 26 February 1999.

1. The Working Group on the Elements of Crimes held eight meetings, from 17 to 26 February 1999. It had before it several proposals contained in documents PCNICC/DP.4 and Add.1–3; PCNICC/DP.5 and Corr.1 and 2; PCNICC/DP.9 and Add.1 and 2; PCNICC/WGEC/DP.1; PCNICC/WGEC/DP.2; PCNICC/WGEC/DP.3; PCNICC/WGEC/DP.4 and Add.1; PCNICC/WGEC/DP.5; PCNICC/WGEC/DP.6; and PCNICC/WGEC/INF.1.

2. At the first stage of the discussion, the Working Group considered the elements for the crime of genocide, in article 6 of the Rome Statute, as well as paragraph 2 (a) of article 8 concerning war crimes, on the basis of the proposals before it. The discussions in the Working Group focused mostly on substantive issues.

3. Taking account of the views expressed in the Working Group and of the written proposals, the Coordinator, in order to facilitate the discussion, prepared discussion papers PCNICC/WGEC/RT.1 to 3 (see appendix) for the elements of crime of genocide and for the elements of crimes relating to subparagraphs (i) to (iii) of article 8, paragraph 2 (a), on war crimes. The discussion papers reflected the substantive consideration of the elements of the crimes mentioned and are without prejudice to the eventual structure of the document on the Elements of Crimes. This issue is particularly relevant in relation to the use of footnotes, comments and introductory general paragraphs. Further discussion is necessary in order to design a structure acceptable to delegations.

Appendix

Discussion papers proposed by the Coordinator

Article 6: The crime of genocide[a] [b]

Article 6 (a): Genocide by killing

Elements

1. The accused intended to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

2. The accused killed one or more persons of that group in furtherance of that intent.

3. The accused knew or should have known that the conduct would destroy, in whole or in part, such group or that the conduct was part of a pattern of similar conduct directed against that group.

Article 6 (b): Genocide by harming

Elements

1. The accused intended to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

2. The accused caused serious bodily or mental harm to one or more persons in that group in furtherance of that intent.

3. The accused knew or should have known that the harm caused would destroy, in whole or in part, such group or was part of a pattern of similar conduct directed against that group.

Article 6 (c): Genocide by inflicting conditions of life

Elements

1. The accused intended to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

2. The accused inflicted certain conditions of life upon the group or members of the group in furtherance of that intent.

3. The conditions of life were calculated to physically destroy that group, in whole or in part.

4. The accused know or should have known that the conditions inflicted would destroy, in whole or in part, such group or were part of a pattern of similar conduct directed against that group.

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[a] The elements laid down in these documents do not address the different forms of individual criminal responsibility, as enunciated in articles 25 and 28 of the Statute.

[b] The discussion paper for article 6 is reproduced from PCNICC/1999/WGEC/RT.1.

Article 6 (d): Genocide by preventing births

Elements

1. The accused intended to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

2. The accused imposed measures upon one or more persons within that group in furtherance of that intent.

3. The measures imposed were intended to prevent births within that group.

4. The accused knew or should have known that the measures imposed would destroy, in whole or in part, such group or were part of a pattern of similar conduct directed against that group.

Article 6 (e): Genocide by transferring children

Elements

1. The accused intended to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

2. The accused forcibly transferred one or more persons from that group to another group in furtherance of that intent.

3. The person or persons were, and the accused knew or should have known that the person or persons were, under the age of 18 years.

4. The accused knew or should have known that the forcible transfer or transfers would destroy, in whole or in part, such group or were part of a pattern of similar conduct directed against that group.

Article 8: War crimes[c]

[N.B. The present paper is without prejudice to its final format, in particular with regard to the inclusion of a general paragraph and footnotes.]

The following general paragraph would be included as an introduction:

> "Consistent with the general principles of law defined in article 30, it is presumed that all actions described in the elements must be intentionally committed and the elements do not repeat the general intent implied for each action. Likewise, the elements presume that the conduct is not otherwise legally justified under applicable law referred to in article 21, paragraph 1 (b) and (c) of the Statute. Hence, the element of 'unlawfulness' that exists in the jurisprudence of many of these offences has not been repeated in the elements of crimes. Absence of a lawful justification for a particular action need not be proved by the Prosecutor unless the issue is raised by the accused."[d]

[c] The discussion paper for article 8 is reproduced from PCNICC/1999/WGEC/RT.2 as orally amended by the Coordinator.

[d] This sentence may require further reflection since it also relates to the work of the Working Group on Rules of Procedure and Evidence.

Article 8 (2) (a) (i): War crime of wilful killing

Elements

1. The conduct took place in the context of and was associated with[e] an international armed conflict.[f]

2. The accused killed one or more persons.[g] [h]

3. Such person or persons were protected under one or more of the Geneva Conventions of 1949 and the accused was aware of the factual circumstances that established this status.[i]

Article 8 (2) (a) (ii)–1: War crime of torture[j]

Elements

1. The conduct took place in the context of and was associated with an international armed conflict.

2. The accused inflicted severe physical or mental pain or suffering upon one or more persons.

3. Such person or persons were protected under one or more of the Geneva Conventions of 1949 and the accused was aware of the factual circumstances that established this status.

4. The accused inflicted the pain or suffering for the purpose of: obtaining information or a confession, punishment, intimidation or coercion, or obtaining any other similar purpose.[k]

Article 8 (2) (a) (ii)–2: War crime of inhuman treatment

Elements

1. The conduct took place in the context of and was associated with an international armed conflict.

2. The accused inflicted severe physical or mental pain or suffering upon one or more persons.[l]

3. Such person or persons were protected under one or more of the Geneva Conventions of 1949 and the accused was aware of the factual circumstances that established this status.

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[e] Some delegations were of the view that the words "and was associated with" were unnecessary because they either were implied in the words "in the context of" or they limited the scope of these words.

[f] The term "international armed conflict" includes military occupation.

[g] The term "accused" has been used provisionally and needs to be discussed to ensure consistency with the Statute.

[h] The term "killed" is interchangeable with the term "caused death".

[i] This element specifies the requisite factual knowledge while clarifying that ignorance of the Geneva Conventions is not an excuse.

[j] Some delegations expressed the view that the element of "official capacity" should not be deleted from the elements of torture.

[k] Some delegations expressed the view that this element was not required to prove the war crime of torture.

[l] Some delegations expressed the view that this element should also include conducts constituting "a serious attack on human dignity".

Article 8 (2) (a) (ii)–3: War crime of biological experiments

Elements

1. The conduct took place in the context of and was associated with an international armed conflict.

2. The accused subjected one or more persons to a particular biological experiment.

3. Such person or persons were protected under one or more of the Geneva Conventions of 1949 and the accused was aware of the factual circumstances that established this status.

4. The intent of the experiment was non-therapeutic[m] and was neither justified by medical reasons nor carried out in such person's or persons' interest.

5. The experiment seriously endangered the physical or mental health or integrity of such person or persons.

Article 8 (2) (a) (iii): War crime of wilfully causing great suffering

Elements

1. The conduct took place in the context of and was associated with an international armed conflict.

2. The accused caused great physical or mental pain or suffering to or serious injury to body or health of one or more persons.

3. Such person or persons were protected under one or more of the Geneva Conventions of 1949 and the accused was aware of the factual circumstances that established this status.

Suggested comments relating to the crime of genocide[n]

[N.B. The following suggested comments, which have not been discussed in detail, are without prejudice to their possible inclusion, to their status and to their relationship with the elements of crimes.]

1. The term "similar conduct" refers to conduct of the nature described in paragraphs (a) to (e) of article 6 of the Statute.

2. The term "serious bodily or mental harm" in article 6 (b) may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment.

3. It is recognized that rape and sexual violence may constitute genocide in the same way as any other act, provided that the criteria of the crime of genocide are met.

4. The term "deliberately inflicting conditions ... of life" in article 6 (c) calculated to bring about the physical destruction, in whole or in part, of a group as such may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.

5. The term "forcible" in article 6 (e) is not restricted to direct acts of physical force and may include, but is not necessarily restricted to, threats or intimidation.

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[m] Some delegations preferred to replace "non-therapeutic" by language used in article 8 (2) (b) (x) of the Statute.

[n] The discussion paper on suggested comments relating to the crime of genocide is reproduced from PCNICC/1999/WGEC/RT.3.